No. 245.

APR 1 1898
JAMES H. McKENNEY,
CLERK

Brief of Hume for D. C.

No. 245.

Filed April 1, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

JACOB SONNENTHEIL

v.

CHRISTIAN MOERLEIN BREWING CO. ET AL.

BRIEF FOR DEFENDANTS IN ERROR

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

F. CHARLES HUME,
Counsel for Defendants in Error.

Clarke & Courts, Manufacturing Stationers, Galveston.

No. 286.

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v.

CHRISTIAN MOERLEIN BREWING CO. ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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For clearness and accuracy we prefer the following

STATEMENT OF THE CASE.

Prior to December 16, 1892, Moses Freiberg, Sam Klein and Jos. Seinsheimer, under the firm name of Freiberg, Klein & Co., conducted a wholesale liquor and cigar business at Galveston, Texas. In February, 1891, it was discovered by Moses Freiberg that the firm had been defrauded of considerable sums of money by

Seinsheimer and was in an embarrassed condition. The largest creditor of the firm was a kinsman of Moses Freiberg, the senior member of the firm, and a settlement was effected with him whereby he scaled his debt materially and took in payment of the balance, besides some cash which the members of the firm contributed from their private means, whiskies out of the firm's stock of goods. With this diminution of their indebtedness the firm hoped to overcome its embarrassment, but after a couple of months this hope was disappointed, the firm being unable to meet its obligations, and a meeting was called at the residence of L. Fellman, in Galveston, and attended by the members of the firm, L. Fellman, H. Kempner, and Mr. Grumbach, who had indorsed for the firm.

Seinsheimer and Grumbach married sisters, and are sons-in-law of L. Fellman. Kempner married the sister, and is the brother-in-law of Seinsheimer. At the time of this meeting Fellman & Grumbach, who were partners in the dry goods business, were indorsers for Freiberg, Klein & Co. to the extent of some $135,000. The condition of the firm was fully disclosed at this meeting and it was concluded that in view of Fellman's financial condition, he being a large indorser for the firm as well as for other relatives, that the failure of the firm at that time would result in his financial ruin. Fellman was "not ready" for the firm's failure. It was further determined that Freiberg should go to Cincinnati for the purpose of inducing some of his kinspeople in that city to assume the

Fellman & Grumbach indorsements; but in the meantime, if occasion should require it, Fellman was to be protected, "come what may."

Upon Freiburg's return from Cincinnati another meeting of the same parties was held at Grumbach's residence in Galveston, and Freiberg reported to them that his mission had failed and it was then resolved by and between all the parties that the firm should go on in business in the ultimate hope that it might "pull through," but for the primary purpose of keeping on hand, by purchase, a sufficient stock of goods to protect Fellman, who was the capitalist in the concern of Fellman & Grumbach, and whenever he should indicate that he was ready for Freiberg, Klein & Co. to fail and by the method of such failure to save enough of the assets of the firm to enable it to continue in business under Fellman's or some other assumed name until its creditors could be forced or persuaded into some compromise advantageous to the firm. The agreement entered into was reciprocal. Fellman was to be protected by the firm to the extent of his indorsements and, in turn, by the use of his name and money the firm was not to lose its interest in the stock or any assets of the firm, but upon settlement with the creditors the stock and assets were to revert to the firm. (R., 187–195.)

In pursuance of this conspiracy, in March, 1891, a request for a report of the financial condition of the firm by Dun's Commercial Agency was answered by a false statement made under the direction of Joe Seinsheimer

(R., 203, 208), showing that the assets of the firm exceeded its liabilities by $200,000, when in truth the firm was insolvent. (R., 201.)

The business of the firm was continued by the purchase and sale of goods, and the Fellman indorsements were continued by extensions and renewals.

In February, 1892, upon striking the annual trial balance it was discovered that the affairs of the firm had drifted from bad to worse and that its further continuance was more than hazardous. Its absolute insolvency was indisputable. The call of the commercial agencies for the annual report was again met by an absolutely false statement, showing assets in excess of liabilities of more than $200,000. (R., 200, 206.) Of all these matters, Fellman, Grumbach and Kempner had full notice, being thereof advised directly by the members of the firm. In the summer of 1892 the early failure of the firm became evident, and goods were purchased and placed in the stock with a knowledge that they could not be paid for. The firm's credits were restricted, and in many instances entirely cut off, and rumors of its insolvency circulated throughout the community. The failing condition of the firm was a matter of discussion among merchants and bankers in the city of Galveston, and inquiries concerning the firm's solvency from abroad were made of the local commercial agencies. (R., 187–194, 206–7.)

A demand of the Commercial Agency, in September, 1892, made at the instance of the Christian Moerlein Brewing Company, one of the defendants in error in this

case, was answered by a false statement showing an excess of $200,000 over all liabilities, and the Brewing Company was thereby betrayed to extend further credit and sell its merchandise to the firm on the usual commercial credit. (R., 199, 210.) It was now evident that the firm would not be able to meet its obligations already incurred, and that it never intended to pay for goods it was daily buying from others. During the months of September, October and November, and up to the 16th day of December, 1892, the day of its failure, the firm made large credit purchases, and early in December, believing that the time for a profitable failure to itself and Fellman had arrived, Fellman, who was then in New York, was called home by telegraph to participate in, guide and manipulate the enterprise. He came immediately, and assumed practical superintendence of affairs. Upon consultation with attorneys, he had the original purpose of the firm, to transfer its property to him directly, changed to a mortgage in favor of the creditors whose paper he indorsed, thus more effectually covering the excessive value of the property to be transferred and placed beyond the reach of creditors. He next employed a trustee, and found, for the salary of $150 per month, a person suitable to his purpose in the plaintiff in error in this case, who is related to him by marriage, and utterly without any knowledge of or experience in the particular business for which he was selected. (R., 111–2, 117–8.) These preliminaries being accomplished, a deed of trust was executed by the firm to Jacob Sonnentheil, the

plaintiff in error, as trustee, to secure home creditors and two who were not home creditors, already secured, save in few and relatively unimportant instances, by the indorsements of Fellman & Grumbach.

The property conveyed by the trust deed exceeded in value the secured debts by about seventy-five thousand dollars (R., 194), and, in accordance with the treaty of reciprocity between the firm and Fellman, was to be purchased by the latter from the trustee and then turned over to the firm under the guise of Fellman's name, and thus be placed beyond the reach of other creditors. (R., 192-3.) That such was the mutual understanding is confirmed by a conversation had between Fellman and Moses Freiberg, senior member of the firm, a few days before the failure, in which Freiberg was assured, by way of consolation, that as soon as Fellman got the stock of goods the firm could run the business under his name (R., 192); and also by a conversation between Werner, agent of the Moerlein Brewing Company, and Moses Freiberg, senior member of the firm, a day or two after the failure. (R., 211.)

Direct proof shows that Kempner, president of the Island City Savings Bank of Galveston, a beneficiary under the deed of trust to the extent of $29,500, secured by the indorsement of Fellman & Grumbach, was fully apprised and actively assisted by his advice and presence in the scheme of keeping the stock filled up at the expense of innocent creditors to protect Fellman's indorsements. The First National Bank of Galveston was fully

apprised of Freiberg, Klein & Co.'s shaky condition through its cashier, W. N. Stowe. The testimony of the witnesses, Freiberg (R., 191), Stowe (R., 220–1), Gorse (R., 206–7), and Werner (R., 210–12), amply shows the general serious and substantial rumors and information in all the trade centers of the Union of the firm's failing condition, thus furnishing ample basis for inquiry to all people who were not betrayed or cheated by the false declarations of the promoters of the fraud.

Two deeds of trust were executed by Freiberg, Klein & Co. to Jacob Sonnenthiel. The first was delivered in the evening of December 16, 1892, and while in the possession of the trustee, and before its registry, in the presence of the trustee, Fellman and Joe Seinsheimer, one of the grantors, a material change was made therein by interlineation, by which it was made to convey property not mentioned therein at the time of its execution by the three members of the firm. Thereupon this deed was delivered to the proper officer and duly registered. From this instrument, prior to its signature, there was eliminated by erasure a power authorizing the trustee to adjust, compound, compromise and settle or sell, transfer and assign, such of the debts or demands of the grantors as might be in dispute or in doubt or of a doubtful nature, upon such terms as in the exercise of a sound discretion might seem to him most advantageous. (R., 121.)

A day or two later, on a Sunday, a second deed of trust was executed, after some opposition of one of the members of the firm of Frieberg, Klein & Co., by which

the erased power in the first instrument was restored and a further power added, by which each member of the firm conferred upon the other full power to execute all such further instruments, assignments and assurances of title as might in the opinion of counsel be requisite to facilitate and expedite the execution of the trust by Sonnentheil. This deed of trust was never recorded or registered, and no one had any knowledge thereof save the trustee and its makers and their counsel. (R., 128-9, 222-3, 234-5.) By neither deed of trust is the value of property conveyed disclosed, nor is it named or specified by itemized schedule, and the trustee is not required to sell the property conveyed to him for cash, but simply to sell the same as speedily as possible in parcels or as an entirety, at public or private sale, and to collect, adjust, compromise or sell at private or public sale all debts and claims. (R., 119-127.)

The possession of the trustee consisted of his having the key to the storehouse in which the goods were situated, and in attending at the store some hours every day. He signed all the letters and all checks, and kept control of the general cash. The three members of the firm were each employed at a salary of $300 per month, Seinsheimer as correspondent, and he also had the keeping of the daily cash receipts, and the other two as collectors. All the employes of the firm, including the drummers, were retained in their respective positions, and at their former salaries. The firm's sign, prominently displayed over the door of the storehouse, was not re-

moved. (R., 115-6, 109.) The business (exclusive of the purchase of goods), with the consent of the beneficiaries, was conducted in the usual way by selling in small parcels, sometimes on credit and sometimes for cash, to the regular customers of the firm. Such customers consisted largely of barrooms throughout the State of Texas, and the purpose of the trustee was in accordance with the wish of the beneficiaries to keep these barrooms going in the usual way by selling them goods on time, so as not to interrupt their usual business, and gradually collect what they owed. (Read testimony of B. Adoue, R., 152; and of Lasker, R., 146-7; and of Levi, R., 224; and of Sonnentheil, R., 141-2.)

The books of the firm, the trustee claimed, were in his charge, but he admitted that all entries made in the books after the date of the failure were made therein by Mr. Joe Seinsheimer, and not under his (the trustee's) direction, but in his capacity as a member of the firm. In fact he claimed to be utterly ignorant of such entries, although they showed that the books had been regularly kept just as though no change had been made in the ownership of the property. From these entries it appeared that a sum amounting to some $2400, which, according to the cash book, should have been on hand, was balanced after the failure by a profit and loss entry under most suspicious circumstances, the dates of the entry both in the cash book and ledger having been erased. The trustee claimed that he kept the firm books simply to ascertain the property belonging to the trust, and

though he knew these books were being kept for the benefit of the firm in the usual way, he did not concern himself about them. It also appeared that, at least in one instance, some months after the failure, Seinsheimer had collected a debt due the firm and receipted therefor in the name of the firm without accounting for the money. There was no outward visible change in the management of the business, except that the trustee was there at times during the day. When the agent of the Christian Moerlein Brewing Company called at the place of business after the failure to inquire about the claim of the company, amounting to nearly $30,000, he was met by the senior member of the firm, who requested that the beer agency be left with him, and that as soon as his firm got a settlement with the Brewing Company, the agency not having changed hands, its business would go right on with the same customers. (R., 211.)

It does not appear from the testimony of any of the beneficiaries that they accepted the deed of trust with a view of binding themselves in such a manner as to preclude themselves from resorting to any other method of realizing their claims in case an opportunity was offered to do so. They were willing to take whatever might be realized under the deed of trust, without releasing their indorsements or an opportunity to make their money out of other property in the event any could be found. See testimony of Lasker (R., 146, 149), Fly (R., 151), Adoue (R., 152), Marx (R., 155–6.)

All of the beneficiaries except Adoue & Lobit, who held a claim of $15,000, secured to the extent of $10,000 by the indorsements of Fellman & Grumbach, have been paid in part by the trustee out of assets held by him under the deeds of trust, and which were not seized by the marshal, and in part by the indorsers. The trustee paid in full the claims of the beneficiaries B. Kahn, A. W. Fly, and the Island City Savings Bank, and partially paid the First National Bank of Galveston. The claims so paid by the trustee aggregated $48,206.73. (R., 117.) The balance due the First National Bank was paid to it by Fellman & Grumbach. (R., 220.) The claims of the American National Bank, Citizens Loan Co., Mr. Ketch, Mrs. Lowenstein, S. A. Walker and the Irwin National Bank were all paid by Fellman & Grumbach after the attachment. (R., 145, 220, 225.) The trustee collected out of the assets not seized by the marshal some $73,000. (R., 144.) In another place his collections, as stated, aggregated $98,020.20. (R., 117.) The part of this amount paid by the trustee to some of the beneficiaries who had actual knowledge of the fraudulent purpose of Freiberg, Klein & Co. would have been more than sufficient to have paid the claim of Adoue & Lobit.

The Christian Moerlein Brewing Company had been doing business with Freiberg, Klein & Co. for some years, and at the time of the failure they owed the company some $28,000 for merchandise delivered to them during the last three or four months. On the 23d of December, six days after the failure, the Brewing Com-

pany filed its suit against Freiberg, Klein & Co. in the Circuit Court of the United States at Galveston for the amount of its claim, and procured the levy of a writ of attachment upon the stock of merchandise for which plaintiff in error sues in this case. Following the attachment of the Brewing Company, other attachments were levied, and the entire stock was sold, realizing $51,258.16, which was placed by the marshal in the registry of the court, and, after deducting expenses, applied to the payment of the various attachment creditors. (R., 106.)

Plaintiff in error, Jacob Sonnentheil, filed three suits to recover the value of the stock of goods so seized and sold, viz: One against the United States marshal and the Christian Moerlein Brewing Company, being the case at bar, and two in the State District Court at Galveston against various sureties on the indemnity bonds given by the various attaching creditors to the United States marshal. (R., 117.) One of the cases in the State District Court was tried prior to the case at bar and resulted in a verdict and judgment for the defendants, but on appeal was reversed by the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas, on account of error in the charge of the trial court. Sonnentheil v. Guaranty and Trust Company, 30 S. W. Rep., 945; 10 Civ. App., 274.

The case at bar went to trial in the court below on the 30th day of October, 1895, and resulted in a verdict and judgment for the defendants on the 13th day of Novem-

ber, 1895. Plaintiff in error filed his motion for a new trial, in which the same grounds now relied on for a reversal were urged before the trial judge for a new trial. On the 14th day of November, 1895, the court overruled the motion, holding that the evidence justified the verdict.

Thereupon the plaintiff in error removed the case, by writ of error, to the United Circuit Court of Appeals, assigning twenty several errors, for all and each of which he asked that the judgment of the trial court be reversed and the case remanded (R. 237-259). The case was submitted to said Circuit Court of Appeals upon briefs and arguments of counsel for both parties, May 25, 1896, and on June 9, next thereafter, that court rendered judgment affirming the judgment of the circuit court (R. 259), and filed its opinion (R. 283-5). In pursuance of the court's order granting leave therefor, the plaintiff in error by counsel, filed his petition for rehearing, June 19, 1896, complaining that the court had treated the case as if the only error assigned and urged was the failure of the trial court to give the requested peremptory charge for the plaintiff (recited in the twelfth assignment, R. 244-5), whereas numerous other indicated errors, presented by the thirteenth, eleventh, fourteenth, first, second, third, fourth, eighteenth, nineteenth and twentieth assignments, were insisted on (R. 259-262). The rehearing was denied by the court, November 24, 1896 (R. 263). The case is here by writ of error, allowed by a Justice of this court, filed in the Circuit Court of Appeals on

December 29, 1896 (R. 286), and upon an assignment of twenty-three errors—the first twenty being imputed alike to the trial court and the Circuit Court of Appeals, and identical in number, order and terms with those assigned in the court last named (R. 265-280, 237-252). The last three errors assigned are ascribed to the Circuit Court of Appeals alone, and are, in substance, hereinafter stated.

BRIEF OF ARGUMENT.

If we do not misapprehend the real contentions presented in the brief of the plaintiff in error, they do not affirm that the evidence was incompetent or insufficient to sustain, substantially, the defense of fraud as against the makers of the trust deed and Fellman; or that evidence, if otherwise competent, of facts or circumstances preceding, attending, involved in, or following the main facts alleged to be fraudulent, is not admissible to establish such fact; or that acceptance by or for any creditor was shown otherwise than by the testimony of Fly, Adoue, Marx and Lasker; or that such acceptance should avail in behalf of such creditor if accompanied by knowledge of the fraud charged, or of any circumstances calculated to provoke inquiry with respect thereto. Therefore, it is believed to be neither necessary nor useful to traverse in detail all the formal propositions of the brief; or to conform to the order in which they are advanced; although in addressing ourselves to what we consider to be the issues *relied on* by the plaintiff in error for reversal of the judgment, we may, in the interest of lucid demonstration, be led to notice parts of the record which relate chiefly to immaterial or uncontrolling contentions.

FIRST.

Even upon concession that the trial court was right in assuming that the fraudulent intent, if shown, of the makers of the trust deeds was not of itself sufficient to defeat the action, if any one of the beneficiaries had—in the legal sense, and without such notice or means of notice of that intent as would render his act ineffective—"accepted;" yet, the court was fully warranted in submitting to the jury the alternative: "But, on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant." (R. 233).

It is patent that an appellate court can find no such "coigne of vantage" for determining the real nature and merits of a controversy as that secured by an intelligent trial court by personal and immediate contact with it in all its forms—and especially by observation of the language, manner and situation of witnesses, where its decision turns on issues of fact.

Fresh from perfect opportunity of observation and knowledge of the case, the trial court refused a peremptory instruction for the plaintiff, predicated upon the assumption that—

The deed of trust in question in this case *is valid upon its face*, and the debts secured therein are shown to have been, at the time of its execution, the bona fide debts of the makers, Freiberg, Klein & Co. *It has been further shown*, that some of the creditors named therein *accepted* said deed before the levy of the attachment of the Moerlein Brewing Company, and *it has not been shown* that at the time of such acceptance such creditors had

knowledge of any fraudulent intent in the making of such deed, or had *any cause to suspect* that the same was made with fraudulent intent. (R., 244.)

Indeed, the court, *inter alia*, instructed thus:

In order to set aside an instrument executed by one party to secure the just debts to another party, in order to avoid that instrument it is necessary that the evidence should show that the party making the instrument was guilty of fraud himself, and the party in whose favor it was made either had *actual knowledge* of the fraudulent intent, or from *the circumstances surrounding the transaction and the evidence taken as a whole*, would show and indicate that he know the fraudulent intent, or that he was *possessed of information which would put a reasonably prudent person upon inquiry, and if that inquiry had been properly followed it would have led to the knowledge* that the instrument was fraudulent. In other words, where a party that is insolvent or in a failing condition, under the laws he has a right to prefer creditors; he has a right to pay one creditor in preference to another if he sees proper to do so, and in doing that, in order to avoid the instrument upon the ground of fraud, the jury must believe from the testimony that the party making the instrument was guilty of fraud himself, and the party receiving the benefit of it either was *a party* to the fraud, or he was *possessed of information* (and by information I do not mean direct testimony, *I mean circumstances surrounding the transaction*) *that would indicate to the mind of a reasonably prudent person that there was fraud in the transaction.*

The natural effect of the instrument given that prefers certain creditors is to hinder and delay other creditors; that is the natural effect of it, but that is not the effect that avoids it; it requires *more* than that; it requires that the party in making the instrument had an intention not only to prefer this debt in fact, but he intended to acquire some *ulterior benefits to himself;* he might intend to *convey a large amount of property to a trustee with intent of having it sold in bulk for less than its value, and buy it in in some other person's name for his benefit.* And he might have reasons by which he might buy this property in bulk and hold it in the name of some other party, so he could reap an interest or benefit from it; he might have some other fraudulent intention, and *some other in-*

tention, must exist than the mere effect—that is, hindering and delaying other creditors. (R., 231.) * * * *

If you *don't* believe these creditors *accepted*, or any of them, *before the attachment was levied*, you will return a general verdict for the defendant, but *if you find* some of the creditors, or any of them *did*, before the attachment, *then* you are to inquire into the question whether fraud existed or not.

If you find no accepting creditor was free from this fraud, in fact, or was free from *that information in regard to the surroundings* that would have put a reasonably prudent person upon inquiry, then, no matter *whether they accepted or not*, you would give a verdict for the defendants. In determining this matter, I would expect you to be *guided by the law* I give you. I never invade the province of the jury; that is what you are here for—the *disputed* questions of *fact; you* are the judges of the *weight of the evidence and the credibility of the witnesses*, and thus being the judges, you are to determine *who has told the truth and who has not;* and in doing that, you have the right to take into consideration the *interest of the parties;* you have the right to take into consideration the *manner of the witnesses on the stand;* in fact, you have the right to *exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there*, but do what you think is right and just *under the law.* * * * * *

In determining the question of fraud, you have the right to look to the fact that *most of the parties lived in Galveston*, two living at a distance, and some of them *represented here in Galveston;* and you have the right to look to the *relations of the parties, and all the circumstances surrounding them*, in order to determine the question of whether there was fraud or was not fraud, and whether or not the *accepting creditors, if there were any, knew* of it or of *facts that would have put a reasonably prudent person on inquiry.* (R., 233-4.)

Under these instructions the jury returned a verdict, and the court rendered a judgment for the defendants, and there was no exception *then* taken to the action of either jury or court. A bill reciting the taking of such exception—because there was no evidence to justify either

the verdict or the judgment--was tendered to the trial judge for allowance, but he "qualified" it by saying that no exception was taken *at the time*, although on motion for new trial his attention was called "to the grounds *therein* stated" and exception taken to his ruling (on the motion), which he considered as, at once, an exception to that ruling and to the verdict and judgment, in that said verdict and judgment were each "*contrary* to the evidence and to the *law* arising therefrom." (R., 235-6.)

We pause at this place to observe and insist that the recitations in this bill as contradicted, or "qualified," do *not* show that *at the time of the rendition of verdict and judgment* exception was taken to either *in any form whatsoever;* and that there is no authorized assignment here presenting or justifying the consideration of error in either verdict or judgment.

The court below could not unite in the same instant of time the occasion of the rendition of verdict and judgment and the occasion—separated from the first by a day—of the hearing and disposition of the motion for new trial (R., 236, 103); nor by "considering" an exception to the judgment rendered on such *motion* as an exception to the *verdict and judgment*, could it be made so —certainly not in any such sense as to be available on assignment here.

Not only did the court manifest by its own instructions, and by refusing the instruction requested by the plaintiff, that the issue of the actual or constructive notice to the alleged accepting creditors of the fraudulent

intent—and not less the issue of acceptance—were, *on the facts, disputed, and therefore for the jury's determination;* but in refusing the motion for new trial, showed that renewed argument and subsequent reflection had not only left unchanged its conviction that evidence had been presented of such character and force as to require its submission to the jury, but had lead to the conclusion that the verdict on that evidence was too well supported to be reversed by judgment granting the motion.

The long extended history of the dishonest scheme, and the varied and crooked expedients by which it was promoted and maintained; the beneficial results that were to accrue to all the parties and privies, to the exclusion of distant creditors whose trust was betrayed and whose property was appropriated for the aggrandizement or protection of others; the persons, the manners, the self-serving testimony of witnesses interested to retain and to affirm the justice of benefits already secured, directly or indirectly, from the impeached transactions, or of witnesses seeing their way to secure such benefits should the impeachment fail—all these, glowing with the colors of life, and in one sense, and despite disguise, with the colors of truth, as well, were submitted to the cognition of court and jury.

Who better than they is qualified to determine what conclusion is warranted by all the facts, conditions, circumstances, revealments—whether unwilling or unconscious—which, together, constitute the evidence that

must be accepted as giving to the transactions impugned their true character?

Grant, if you will, that the very act and article of knowledge in law of the fraudulent intent are not fixed by direct, open and patent proof—

> "But yet, I say,
> If imputation and strong circumstances,
> Which lead directly to the door of truth,
> Will give you satisfaction, you may have it."

Our preliminary sketch of the history of the case is thought to reflect fully and faithfully the substance of the oral and paper evidence. Extracts from or reference to the testimony of some of the witnesses may serve, perhaps, to make a few facts clearer.

MOSES FREIBERG.

As to our firm being in condition, February 1, 1892, to continue business, buying goods and keeping its stock up without obvious peril to its creditors, *subsequent results of our business answer this question.* (R., 191.)

* * * * * * *

A very short time before our failure, Mr. Fellman took me to task for not coming to his store, where I used to go quite frequently. I told him I felt too badly about our affairs, and he asked me to step into Tiernan's place, where we sat down and talked it over. He told me that I was a fool to take the matter so to heart. Lots of people had failed before and lots more would fail hereafter. He furthermore said: "You need not worry. *After I buy you out you can run the business in my name until you get a settlement. If you can not raise money enough to make the settlement, I will see that you get the money to make the settlement with.*"

* * * * * *

I remember the signing and making of the second deed of trust to Mr. Sonnenthiel. It was made on *Sunday* morning following our failure. I came to the store on Sunday morning, and Mr. Seinsheimer told me Mr. Klein would arrive in a few moments from Dallas. I asked him what for, and he said the deed of trust *had two kinds of handwriting, and the lawyers thought it looked bad, and there might be some trouble.* (R., 192.)

* * * * * * *

After the trust deed was made, and *before* the goods were attached, I conversed with Mr. Fellman, and told him to buy the goods before there were any attachments levied. I thought there was danger of attachments being run. He said he was not able to buy. He could not make the financial arrangements. *I made the request because Mr. Fellman had promised me he would do so,* and also, as stated, because I was afraid that attachments would be run on the stock, and it appeared to me from the action (of) and conversation with Mr. Fellman that he courted and in a manner invited such attachments. * * * I requested Mr. Fellman to replevy the goods from the United States marshal *after* attachment had been levied upon them. *He answered, that it was as good a sale as he cared to make* I made the request, *because Mr. Fellman had promised me to let us continue the business in his name or some one's else until we would get a settlement.* I knew if the stock was not replevied there would be nothing to *continue the business, nothing to sell, and without stock to keep up the barrooms who owed us large amounts of money, I knew there would be a waste and slaughter of our assets,* as subsequent events have proved there was. I thought I had a right to demand the replevy of the stock, because *during all our conversations and all of our meetings and confabs it was always understood and agreed by Mr. Fellman the stock should not go out of our hands, come what may.* Our understanding was, that *we were not to loose our interest in the stock nor in any of the assets of the firm.* It was all to revert to *us when settlement was made.* * * *

We (Klein and Freiberg) showed him (Fellman) the necessity of replevying the stock so *we* could keep on supplying the saloons who owed *us* large sums of money, and who would and could not pay *us* unless *we* could so supply them, and he finally agreed to the replevying of the stock, and said he would try to make arrangements; but later he informed us he could not do it, and Mr. Son-

nentheil informed us he refused to replevy the stock. Finding our pleadings were of no avail, Mr. Klein and I called on Mr. Fellman at his rooms at the Tremont Hotel and *reminded* him that he had *promised* us that *we could continue the business, either in his name or in ours*, and that now there was *nothing to sell and nothing to make a settlement* with, and we demanded that he set aside the sum of $25,000 in the hands of some third party for the purpose of making a settlement with our creditors. The demand was for the sum of $25,000 to be set aside for the firm for the purpose of making a settlement with our creditors. *It was made, because it was promised to us that we should be furnished with the means to regain our name through the medium of the stock and other assets of the firm.* In response to this demand Mr. Fellman called us all kinds of names, stormed around a good deal, and told us he would not be blackmailed, and refused to concede anything. Mr. Fellman did not wish his name to appear in the trust deed, and as I understood it, *one of the principal reasons was that the business was to be continued in his name in some shape until we could make a settlement.* I never did clearly understand why the change was made, and the trust deed executed instead of conveyance to Fellman of the stock, or of enough of it to secure him against the liabilities he had assumed as indorser, but there was sufficient argument brought to bear at the time to induce me to consent to the change. (R., 192-3.)

* * * * * * *

We had considerable trouble to get credit after the spring of 1892. During the spring and summer 1892 *we were restricted or entirely cut off from credit by parties from whom we had bought on credit for many years. There was considerable talk and rumor of our firm being in a failing condition.* Intimation came to me *by being refused credit, and we asked for explanations and were told why. We received several letters upon the subject, and we realized that we could not continue unless* we met with *extraordinary* good luck or fortune. We continued to purchase goods *up to within a few days of giving the trust deed.* * * * *We bought on credit.* (R. 191.)

L. A. GRELLING.

I looked after the bank affairs of Freiberg, Klein & Co. on the outside—their money matters; did some borrowing for them.

They had their checking account in the year 1892 with the Island City Savings Bank, but they borrowed money from several institutions—the Citizens Loan Company, Adoue & Lobit, the First National Bank, the American National Bank, and private parties. The Irving National Bank of New York did business with them as a foreign account. The bank paper was paid or extended from time to time, as I observed in their business that year. It was about 1887 when they changed their checking account from the Texas Banking and Insurance Company to the Island City Savings Bank. From that time on they did no business with the Texas Banking and Insurance Company. They did no other business with the Citizen's Loan Company and Adoue & Lobit, except to borrow money from them. I think at no time after they began doing business with the Island City Savings Bank did they cease to be debtors of that bank. The paper and debts were extended or renewed because they did not have the money to pay it, or needed it for other purposes, or it did not reach around as far as they wanted it to go. Their limit of credit was reduced. I do not know that this was the case at the Island City Savings Bank. It might have occurred in other places. At the First National Bank we were several times requested to reduce our line of credit. At one time during Oppenheimer's administration it was reduced to the extent of $5000 at the First National Bank. We deposited with the Island City Savings Bank, and checked against it. With the other banks we got money from them as we wanted it and could get it. It was about two years before the failure that Oppenheimer requested the reduction of the line of credit at the First National Bank. This was the only reduction that was made, except, perhaps, with the Irving National Bank. I think they reduced that once $5000. At the Citizens' Loan Company they owed probably $15,000. At the First National Bank, I think the largest amount they ever owed there was $25,000, and it was reduced to $20,000 at that time; afterwards got the $5,000 back again. They owed the Island City some $30,000 on indorsements, but they owed them more money on collateral security. Sometimes we had trouble in getting paper renewed, because the banks claimed they wanted to reduce the loan and give it to somebody else, or they owed too much, more than their account justified. If we could not talk them out of it and get the money there, we would have to get it some-

where else; generally tried to talk them out of it. I considered Freiberg, Klein & Co. insolvent on December 16, 1892, *and for several years before.* My knowledge was derived from the general connection with their books, their business, and accounts. I think the members of the firm were aware of the status of the business. (R., 197-8.)

Interrogated with respect to a report made to the Commercial Agency, September 29, 1892, by Freiberg, Klein & Co., showing net worth of $208,623.35, the witness said:

We usually made reports in February. This was necessarily a *special* report, a *call* report, as they call it, made when a subscriber to the agency has a special desire to learn something of the credit or standing of the merchant who is doing business, and *something calls him to ask for a special* report. He goes to the commercial agency and asks for such a report, and the agency's duty is to go to that firm and ask for a special report. I should judge this is a call report, not a regular report. (R., 199.)

E. H. GORSE.

Speaking to the said report of September 29, 1892, the witness said:

The statement was rendered after a request on my part, *as I had information from other sources that the firm was in a shaky condition and their credit suffering.* I called upon them for an honest statement so that I could verify *rumors about them,* or deny them if they were false. I expected them to make an honest showing, and regret that I believed at the time that it was an honest showing. * * * Large firms were asked for statements once a year. I asked for an additional statement from *this* firm, for the reason above stated, that I had information from other sources that they were shaky and their credit suffering. *The firm's credit was becoming a matter of concern in mercantile circles,* and it became necessary for me to inquire more thoroughly into their financial

condition. I therefore asked for statement, and while I might have questioned the value of all the assets stated, I regarded these figures as showing a healthful financial condition, provided their representation as to liabilities was correct. Rumors were afloat that they were slow in payments, owing largely to banks and individuals, credit refused them in some quarters, and generally that their business was not healthful. *Inquiries as to the financial standing of the firm came from Northern and Eastern cities, local banks and firms. There were rumors in Galveston general in their character, and discussed among brokers, bankers and merchants.* These rumors affected me to the extent of desiring to post myself as to the foundation for them, and I made inquiries generally with somewhat unsuccessful result, as Seinsheimer and Grelling *misrepresented the financial condition of the firm, and banks were not willing to tell the truth about the firm affairs in so far as related to the banks.*

The rumors referred to, and the nature and character of which I have stated, were certainly of sufficient importance *to suggest a most rigid investigation by interested parties.* (R., 206–7.)

LEWIS WERNER.

In the fall of 1892, we (Moerlein Brewing Co.) had information that led us to make inquiries concerning the financial condition of Freiberg, Klein & Co. They owed us quite a large amount of money, and we heard bad rumors about them and wanted to satisfy ourselves whether they were all right or not. I went to Dun and Bradstreet, and told them we had unfavorable opinions about them and wanted special reports. We were supplying them with goods, and were interested in knowing their true condition with reference to future transactions, as well as with reference to what they owed us at the time. [Witness here identified paper as statement furnished him at that time by Dun's Agency in response to his inquiry.] After having heard these rumors and having these reports, we thought the rumors were unfounded, and that Freiberg, Klein & Co. were all right. They failed on the 16th. I left home on the 17th, and got to Galveston about the 19th or 20th. When I arrived I went to Freiberg, Klein & Co. to see how matters stood. (R., 210.) * * * He (Freiberg) said they were working at the books; he

could not tell then, but in a day or so he could tell. On (witness') second interview, Freiberg said he could not give any statement in that short time; it would probably take until the first of the next month. He told me he would like to run the Christian Moerlein Brewing agency in Galveston on a salary—sell beer for them. He mentioned it in that way. *After they got a settlement with us they would go right ahead; the beer would not change hands at all, would go right to the same customers.*

Freiberg and Seinsheimer stated * * * that they were in such shape they could not go on any longer, and had to fail because they were broke. (R., 211.)

Being cross-examined, the witness said:

With reference to the rumors we heard in the fall of 1892, prior to obtaining the report of September 29, 1892, we got a letter from *our agent in New Orleans that certain traveling men had told him that Freiberg, Klein & Co. had been refused credit, and that things looked kind of squally, and for us to look out.* That was the substance of the letter. We got *other* information. After getting the report from Dun and Bradstreet we were satisfied, and continued to sell them goods thereafter. (R., 212.)

W. N. Stowe, cashier First National Bank, did not know that Freiberg, Klein & Co.'s failure was impending before it occurred; had there been rumors affecting the solvency or standing of a large firm in Galveston he would have heard it; had there been such rumors concerning Freiberg, Klein & Co. he would have heard it—*from his own officers, if from no one else.*

But notwithstanding all this, the witness said, further:

I know E. H. Gorse, who represented R. G. Dun & Co. here. *He was in the bank several times to see me, as all these men do whenever they have an inquiry concerning the credit of anybody* in the city. I know he came in there once to see me *and asked me about Freiberg, Klein & Co.; said he was getting several inquiries, and wanted to know how they stood. I told him I knew nothing about them at all,*

except we could say this for them, we had $25,000 of their paper, and we renewed it for them whenever they asked us to do so. I did not tell him whether or not I considered them good. I do not suppose he asked me the question. I did consider them good, however. I would not have taken their paper if I had not. *We had indorsers on their paper, and that made it that much better, of course.* (R., 221.)

What is to be thought of the value of a witness' statement that no rumors hurtful to Freiberg, Klein & Co. were current, at a time when the commerical agent, whose business it was to receive and pursue such rumors, was acquainting him personally with the fact that *several inquiries* directed to the credit and standing of that firm were seeking replies—inquiries which, in their very nature and frequency, indicated the profound distrust which mere *rumors* do not reflect?

Think of the eccentric qualities of a mind that denies even the dignity of rumor to earnest inquiry, prompted by the solicitude and distrust of not one interested party, but of many, and pursued with intelligence and method by those whose sole business it is to answer it!

But whatever else may be suggested by the testimony of this witness, the most indulgent inference is, that he had little concern in, or aptitude for detecting the signs of, the financial decline of debtors *whose obligations were made sure by solvent indorsers*—especially when his "own officers," presumably as well content in the particular case as himself, chose to observe that silence which is golden.

M. Lasker, at the time of Freiberg, Klein & Co.'s failure, was vice-president, director and chairman of the

finance committee of the First National Bank—the same of which Stowe was cashier. He occupied the two relations last named to the Citizens' Loan Company also, and was, perhaps, its president. (R., 145.) The record does not seem to reflect his nominal official relation to the Island City Savings Bank, but he obviously regarded himself as holding substantially the same authority in the three companies whenever the value or safety of credits required consideration, decision or action. (R., 147–8.) It will not be forgotten that these three companies are practically representatives of the same interests —the Citizens' Loan Company owning a controlling property in the First National Bank and the Island City Savings Bank. (R., 143.)

Lisker enjoyed undisputed pre-eminence in all these institutions in the arts of passing on credits and keeping pace with debtors who failed to meet their obligations when due, or fell into insolvency before the time fixed for performance had elapsed. He had exercised his exceptional talents for many years, not only without criticism on the part of his constituents, but with their unquestioning, and, indeed, admiring approval. With modest and pardonable pride, he declares, in effect, that his long and fruitful experience, unbroken by a single lapse of fidelity, vigilance or wisdom, had, in his chosen and special sphere of mental and physical activity, won for him, "by common consent," the name and dignity of "expert." And yet it was he who did not "know" of the imminence even of a failure, occurring in his own city and under his own eyes,

of a vast concern whose promises to pay large amounts were held by all the special constituents whose safety from financial loss it was his paramount business, duty and interest to secure (R., 145-8.)—a failure foreshadowed long before by the fears and precautions of creditors in distant cities, by the eager inquiries of commercial agencies, by prophetic discussions among bankers, brokers and others who were his immediate neighbors, by the well-founded reports of ubiquitous "drummers," in nowise particularly concerned in the pending event.

May we not find explanation for this unwonted dullness of perception of signs which others were quick to see and interpret—for this presistent blindness to that which was revealed to the common vision—in the fact that all his constituents were shielded by the obligations of solvent indorsers, and could not lose (as the event proved), come what might?

May we not accept his own statement made *after* the fact as reflecting his sense of security *before*, and affording solution of his otherwise unaccountable lack of prevision?

> I led all the directors to believe that we were entirely safe and would not lose a dollar between the deed of trust and the *indorsement we had on notes.* Between the two there was no question but that we were covered beyond peradventure. (R., 149.)

Beers, secretary of the Citizens' Loan Company, understood Lasker's sense of security as due *altogether* to the *indorsements.* He said:

> Mr. Lasker was vice-president at the time, and he said *the indorsement of Fellman & Grumbach made it* (the debt due by Freiberg, Klein & Co.) *perfectly safe without the assignment.* (R., 220.)

The court's charge discloses the fact that the defendants relied *inter alia*, on the averment that *indicia* of fraud, intrinsic and extrinsic, characterized the trust deeds:

> They have also specially answered * * * claiming among other things that there were certain badges of fraud upon the deed of trust that was made—not claiming these badges rendered void the instrument upon its face, but these badges of fraud, coupled with other evidence, made it fraudulent in fact. (R., 229.)

These "badges of fraud" are now presented and discussed, as they were on the trial:

First:—Intrinsic:

1. Authority of trustee, as speedily as possible, to sell and convey the personality in *parcels* or as an *entirety*, at *public* or private sale. This is nothing short of authority to sell the goods *parcel by parcel*, and thus consume an *indefinite* time in disposing of them; to sell on *credit*, and take *promissory notes*, maturing at *remote dates;* to put the property into *negotiable* paper, transferable to good faith purchasers before maturity, and thus rendered secure against any process of creditors.

That the above provision of the deed reflects the authority ascribed to it by our construction of it, is signally manifested by the meaning assumed for it by the acts of the parties themselves—the trustee, the beneficiaries and their attorney.

Adoue testified:

> Sonnentheil finally asked the question if it was best to *sell the goods on credit or to sell them for cash, as a whole. We settled that point in favor of continuing the business as it was*, as we considered that character of business, a good deal in bar rooms,

there would be a great loss *unless the business was kept going on as it was.* (R., 152.)

Power to trustee to sell on *credit* is a badge of fraud. *Baldwin v. Peet*, 22 Texas, 714; *Eicks v. Copeland*, 53 Texas, 590. So is the power to sell at *private* sale. *Carlton v. Baldwin*, 22 Texas, 724.

In *Gregg & Son v. Cleveland*, 82 Texas, 187, the deed directed the trustee to sell the property in due course of trade for cash, and to carry on the retail business in the regular course of trade. *Held:* That grantor, being insolvent, the *necessary* effect of that part of the deed was to hinder and delay creditors, and *vitiated* the deed. *It placed the surplus for an indefinite period beyond the reach of creditors.* Upon the undisputed evidence, taken in connection with these recitals, the Court below should have charged the jury to find against the party claiming under the deed—citing Gallagher v. Goldfrank, 75 Texas, 565.

The *principle* of the decision is applicable here. It is true that the deed of Sonnentheil does not direct him to sell in due course of trade, nor to carry on a retail business; but it gives him a *discretion* that enables him to consume an indefinite time in realizing on the goods, and to sell on credit in such wise as may put the surplus beyond the reach of creditors for all time.

The case is to be distinguished from *Simon & Co. v. McDonald*, 85 Texas, 237, and cases there cited in briefs. There the power was to sell for *cash*.

Haas v. Kraus, 75 Texas, 106, was the case of attachment of an insolvent debtor's property, after it had been transferred and delivered to a trustee with power to sell and dispose of it "on such terms as to him may seem best." *Held:* That the question was for the jury, and

should have been submitted to them, whether the conveyance upon its face, and in connection with other circumstances in evidence, was fraudulent.

Although not in the same words, the grant to Sonnentheil is no more nor less than an investiture in him of the power to sell on such terms as may to him seem best.

In *Greer v. Richardson Drug Co.*, 1 Texas Civil Appeals, 634, it was held, that power in a deed to a trustee (the grantor being insolvent) to hold the goods conveyed for six months, only selling at the usual market price, in connection with the great excess of the value of the goods over the debt secured, unreasonably delayed other creditors, and was, as to them, void. Citing Gregg v. Cleveland, 82 Texas, 187, and Gallagher v. Goldfrank, *supra.*

We do not perceive that the power to hold for six months authorizes a greater delay (if, indeed, so great), as does the power to sell by parcel or altogether, at public or private sale, without restriction as to *mode* of sale, whether for cash or upon credit.

A credit provision is denounced as fatal in *2 Bigelow on Fraud*, 306-7.

An insolvent debtor can not deprive his creditors of their right to have his property converted into money without delay. He can make an assignment with preference, but he can not authorize his assignee to sell on credit. *Wait's Fraud. Con.*, secs. 332-3.

Illustratively, the following citations are in point:

Wait's Fraud. Con., Sec. 11: Conveyance of real estate to trustee to sell and apply proceeds, *as fast as they can be realized*, to payment of grantor's debts, *necessarily* operates to hinder and delay creditors. So a trust lien on personalty *for an indefinite period*, the natural operation of which is to benefit the grantor, is fraudulent as to creditors. "The creditor must take care in making

his contract that it does not contain provisions of *no advantage to himself*, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose but his own indemnity. If he goes beyond this, and puts into the contract *stipulations which have the effect* to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract."

Robinson v. Elliott, 22 Wall., 523: A debtor can not take the law into his own hands and attempt to secure the delay which can only be obtained by consent of creditors.

Wait's Fraud Con., Sec. 14: The debtor must devote all his property absolutely to the payment of his debts; reserve no *control* for himself (Means v. Dowd, 128 U. S., 281); provide for no benefit for himself (Lukins v. Aird, 6 Wall., 79), other than that which may result from the payment of his debts; impose no conditions upon the right of the creditors to participate in the fund; *authorize no delay on the part of the trustee.* (Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y., 148.)

Wait's Fraud Con., Sec. 331: Authority to trustee to conduct the business "for such time *as in his judgment* it shall be beneficial to so do," or to sell all the goods and stock in trade "*at such times and in such manner, and for such prices as he may deem proper*," renders assignment void as to creditors. "It is an attempt on

the part of the debtor to place his property, *for an uncertain and indefinite period*, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the *uncontrolled discretion* of a trustee of the debtor's own selection." (Jones v. Syer, 52 Md., 211.)

2. Alteration of the trust deed:

The original embraced the power to adjust and compromise debts at discretion of the trustee. This was erased, and the instrument, as altered filed with the county clerk as a chattel mortgage. Later, the second instrument was made—on Sunday. This restored the power erased in the original, *added the power to each partner to act for all the others in the course of administration of the business*, and *was never filed.*

The discretion conferred by the restored power is a badge of fraud; so also is the added power, because if Sonnentheil was really intended to be a *bona fide* trustee, and to have exclusive authority as such, no act of any of the grantors in connection with the property conveyed by the deed was necessary or lawful. They had nothing, in that case, to do with it; and the addition of the power shows that they had not relinquished their dominion over the property, and were contemplating some action concerning it contrary to the purport of the deed as originally expressed—such as effecting some adjustment with their creditors upon terms saving to them their business, and at least some of their property, as contemplated by their conspiracy with Fellman.

Mr. Levi, of counsel for Sonnentheil, testified that the purpose of the second instrument was to *confirm the interlineation in the first*; but pending its preparation, he and his associates—

thought it was *wise* also to have a power from the different grantors in the second instrument, each to the other, to make *further assurances of title or conveyance or documents that might be necessary for the expeditious conveyance and proper carrying out of the trust.* (R., 223.)

3. Provision for attorney's fees through the *whole course of administration:*

Simons v. Ashe, 1 Civil Appeals, 210, holds that authority to trustee to employ attorneys and to carry on the business for four and one-half months, are badges of fraud—not conclusive, but tending to show fraudulent intent.

Wait's Fraud. Con., Sec. 335: Attorney's fees, *other* than for *examinations of the facts*, and for advice and services *in drafting the assignment and securing it to be properly acknowledged and recorded*, can not be lawfully provided for by the deed. At this point *the control of the assignor ceases.* (Hill v. Agnew, 12 Fed. Rep., 283.)

4. Uncertainty of items of indebtedness, as to amount, nature, dates of accrual, and maturity, and whether or not interest-bearing, and failure to show the amount, nature, and value of the debts, claims and demands due the grantors—thus concealing the fact as to whether the property transferred was greater than the debts provided for:

Baylor v. Burns, 3 Texas Civ. App., 178—citing Jackson v. Harby, 65 Texas, 715, and Haas v. Kraus, 75 Texas, 106.

Second:—Extrinsic:

1. Heavy purchases of goods just before transfer; and, in this connection, representations, known to be false, of large capital to the commercial agencies, inducing credit:

Bump's Fraud. Con., 582–3.

2. Additional security of debts already secured by Fellman's indorsements:

Wait's Fraud. Con., Sec. 241.

3. Retention by grantors of possession—whether absolutely or concurrently with the trustee—and practical direction of the business:

Linn v. Wright, 16 Texas, 24, is a valuable discussion of the theory of fraud arising from any agency of the grantors with respect to property after its assignment to the trustee. The instrument there was assumed by the court to be in the nature of a general assignment, although it preferred creditors. It purported to vest title and possession in the trustee, Linn, who was defendant in the suit. The property was in the grantor's possession when the writ was levied. The burden thus being on the trustee, he proved that the key of the storehouse was delivered to him, together with the assignment; that the fact of the assignment was well known; that the debts provided for were valid; that he was frequently in and about the house in which the goods were offered for

sale; that he collected money due the grantor before the deed was made; that he paid the license on the sale of the goods after; that he took and sued on a note given after the deed for an indebtedness due the grantor prior thereto. Plaintiffs proved that the trustee said he took the assignment for the purpose of aiding the grantor to get through his difficulties; or something to that effect. They offered to prove declarations of grantor and grantee, subsequent to the assignment, as to intention in making it.

Objection that only the *grantee's* declarations were competent, unless those of the grantor were made in the grantee's presence, and at the time of making the deed, was sustained.

They offered, also, to prove purchase of goods, after the deed, by a third party of the grantor, and the crediting of the price to an account due by the grantor. Objection that the grantee could not be affected by the offered proof, unless knowledge of the facts was brought home to him, was sustained.

It was shown that the grantor remained in the store, made settlements, and seemed to have charge of the business generally.

Evidence of acts of the grantor was excluded, on the ground that the grantee's knowledge thereof was not shown.

The Supreme Court held that *all the evidence excluded should have been admitted.*

In the course of the opinion it is said:

"His (the assignee) permitting the latter (the grantor) to remain in possession of the goods was apparently inconsistent with the terms and intention of the deed. It was *of itself evidence of fraud,* which required explanation. Having been permitted to retain possession of the goods, when the *deed* imported that the possession as well as the property in them was transferred to the defendant, and was to be retained by him, the presumption must be that he was permitted so to retain the possession *in accordance with the understanding of the parties at the time of making the assignment;* that the matter in which he dealt with them was in accordance with such understanding between himself and the defendant, and that the debtor was acting in pursuance of such understanding *and by authority of the defendant.* * * * It was perfectly competent to introduce the evidence proposed, for the purpose of showing that while the *deed* imports one thing, the *acts of the parties* import another and very different thing; that, in a word, their *acts had not been consistent with their deed;* and, *hence, that the latter did not contain a true exposition of their motives and purposes in making the conveyance.*" 43-5.

The court clearly declares that where the question at issue is the fairness or intention in making the instrument, the *books* kept by the parties, respectively, as well *after* as *before* the assignment, and other acts of the parties, should be admitted in evidence. Sonnentheil v. Texas Guaranty and Trust Co., 30 S. W. Rep., 951, 10 Civ. App., 274, a Texas case on the same facts, is to the same point; as are also *Linn v. Wright*, 18 Texas, 317, and *Eames v. Kaiser*, 142 U. S., 488, 492, cited by it.

In the case at bar—as has been shown by the statement—the business appeared to proceed after the deed was made as theretofore. The office employes remained the same and continued in the same line of service; the books of the grantors were kept up as if there had been no interruption of their business, and this without ob-

jection of the trustee; each of the insolvent grantors was employed in the business by the trustee at the very comfortable monthly salary of $300—Seinsheimer as bookkeeper and chashier; Klein as collector in north Texas; Freiberg as collector in east and west Texas. These gentlemen expected to resume business if they could make a "settlement." There seems to be nothing to explain why their regular books were kept after the deed was made, *unless* it be that they felt themselves to be *really in charge* of the business, or in a situation soon to *recover* and *continue* it, as before the deed. It, of course, goes for nothing that the trustee declared himself to have been in possession when the marshal attached, or that the marshal made the same declaration—if, *in truth and fact* the *res gestæ* declare otherwise.

2 *Bigelow on Fraud*, 337–8: The debtor must not retain possession; that is the real requirement of the law. Now the property, for one reason or another, may be incapable of any handing over, in the ordinary sense; in such a case, it should be enough, and it is enough, *for the vendor to withdraw from it*, upon the completion of the transaction, *and leave it with the buyer* * * * It is not the place where the property lies, *but the connection of the place with the owner, that shows the possession;* and so far as the element of mere delivery is concerned, *complete bona fide withdrawal of the seller* is probably sufficient in all cases.

The author cites, in note:

German v. Cooper, 72 Pa. St., 32: On the sale of goods and chattels they must either pass out of the seller to the buyer, *or the seller must pass away from them*, leaving them in the *exclusive* possession of the *buyer*.

Wait's Fraud. Con., Sec. 249: To protect property from attachment by creditors there must be substantial and visible change of possession. The vendee must acquire the open, notorious and *exclusive* possession of the property, and this implies that the vendor is *divested of the use, possession* or *employment* of the property. (Rothschild v. Rome, 44 Vt., 389, 393.)

Wait's Fraud. Con., Sec. 259: *Concurrent* possession of vendor and vendee is *colorable*. The possession of the vendee must be *exclusive*. If not, the transfer is fraudulent and void as to creditors. It is no change of possession to leave the property in charge of the vendor's agent.

4. Property conveyed in excess of debts secured, the excess being about $75,000.

Jackson v. Harby, 65 Texas, 710; *Haas v. Kraus*, 75 Texas, 106; *Baylor v. Brown*, 3 Texas Civ. App., 178.

Argument, accompanied by numerous citations, is directed by the plaintiff in error to show: that the fact is immaterial that more property is devoted by an insolvent and fraudulent debtor's trust deed to a debt due to a preferred creditor than is reasonably sufficient to satisfy it; and that there is a distinction between the legal *status* of such creditor and that of a creditor who receives by direct conveyance from such debtor property exceed-

ing in value a debt due, namely: that the creditor first named is secure, if, although having notice of the debtor's fraudulent intent, he is not a participant in the fraud itself—while the creditor last named is insecure, because affected with notice of the fraudulent intent, although not participating in the fraud itself. (Brief of plaintiff in error, 37–41.) And at another place the attempt is made to demonstrate that the property conveyed to the trustee here was not in excess of the debts secured. (Id., 57–9.)

The principal case relied on to support the argument is one wherein both the makers and beneficiaries of the trust deed were expressly found to have acted in good faith, the value of the land devoted to the debt not being more than fully to secure it.

True, the witnesses put the value of the land at $34,000, while the debt secured was $25,000, by promissory note; but when the trust deed was executed, the beneficiaries seem to have known that the makers were seriously embarrassed—involved in liabilities exceeding their assets—and the trial court may, very reasonably, have had in mind the delays and expenses which under such circumstances must have seemed to the beneficiaries as likely to attend the pursuit and realization of the debt due them, against the hostile interests of other creditors, when it did not find "that the value of the land was, *against all contingencies*, more than enough to secure the debt." (Simons Hardware Co. v. Kauffman & Runge, 77 Texas, 133–4, 136–7.)

The point ruled in Haas v. Krause, 86 Texas, 698, is that the fraudulent intent of *the debtor alone* does not affect the validity of a trust deed executed to secure a creditor: the ruling there attacked embodied the precise proposition that a failing debtor may give a valid mort-

gage "on *so much* property *as may be necessary*" to secure a *bona fide debt.* (887–7.)

No case cited will be found to declare free from suspicion the devotion to a debt of property in excess of such debt to an amount more than one-half thereof.

As has been before remarked (Brief 6, R. 194), Freiberg considered that the property conveyed by the trust deed, was, at that time *worth* about $220,000—more by about $75,000 than the sum of the debts named in that instrument.

The debts aggregated, say, $140,000. It is clear that Freiberg's figures were designed to reflect the *real* value of the property conveyed; for instead of giving the gross nominal assets, shown by the books, of $317,000, he allows as much as $97,000 between that aggregate and the real value.

On the other hand, it is well nigh inconceivable that of assets received by Sonnentheil, the trustee, aggregating $317,000, as much as one-half, within a fraction, were worthless, as asserted by him.

But, however that may be, the testimony of the two witnesses raised an issue of fact as to the real value of the property conveyed to the trustee and the excess of that value over the sum of the secured indebtedness, and it was for the jury to determine that issue.

Referring to the erasures in the first deed and the additions made to the second, the court, in its charge, said:

> As to the legal effect of these instruments, I think *upon their face*, they are legal instruments, and that the causes complained of amounting to badges of fraud or signs of fraud, I think as they apply to this case do not amount to that. The fact that the second instrument was not recorded, is immaterial, because the

plaintiff, Jacob Sonnentheil, under the undisputed testimony, was in the actual possession of the property, and therefore it was unnecessary to record it. His possession would be notice to all attaching creditors. *The continuing of the employes of Freiburg, Klein & Co. by the plaintiff would be a circumstance tending to show fraud*, but it would not be sufficient within itself, but *may be considered by you simply as a circumstance in connection with the other testimony* in determining the question of intent with which the instrument was made. (R., 234-5.)

It is not clear that the court intended to state, *as matter of law*, that the erasures and additions were not to be considered by the jury. The language admits of the construction that the court thought the instruments *valid on their face*, notwithstanding the erasures and additions. But, certainly no *greater* force can be accorded to the language than that the *erasures and additions—not any other* alleged badges of fraud—were excluded from the jury's consideration. It is true that in so far as notice to attaching creditors was concerned, if Sonnentheil was in actual possession, the record (*filing* is the requirement) of the second instrument was not necessary *to indicate the mere fact that he was acting as if he had such right as would inform such creditors that, in assailing it, they proceeded at their peril;* but this would not conclude inquiry into the *nature* of his title, nor evidence that, purporting to claim under one constituting instrument, his title really rested on another and distinctly different one, nor would it deprive the attaching creditor of the benefit of the potent inference arising from the fact of the existence of the second instrument and its vital variance from the first, that marks of fraud concealed by the one exhibited to

the public were revealed by the one of which the public had neither information nor means of information.

The point is entirely apart from and unaffected by the assumed fact of actual possession.

The court must have so considered it; for it expressly, and in the same connection, authorizes the jury to consider the fact of the retention by the plaintiff of the employes of Freiberg, Klein & Co.—a fact everywhere and always considered as one of that class of facts which go to the question of *whether one's possession is of a character and with a purpose that are in harmony with the instrument under which he holds.*

Therefore, the verdict of the jury and the judgment of the court are entitled to the support of every inference of fact that can be reasonably deduced from the internal and external symbols of fraud pertaining to the instruments themselves, or to the practical construction of them by parties and privies—considered in connection with all other evidence.

As has been seen, an appellate court of Texas has considered at length the same facts, substantially, (the issue of acceptance, however, being pretermitted) as were at issue below in this case, and announced the results of its examination of them, and of the law that applies to them, in terms of great force and clearness. Sonnentheil v. Texas Guaranty and Trust Co., 30 S. W. Rep., 945; 20 Civ. App., 274.

It reversed the judgment of the trial court for error in its instructions, to the effect that the fraudulent intent of

the makers was sufficient to avoid the trust deed, without respect to knowledge thereof by the beneficiaries. Quite recent decisions were relied on; and earlier cases urged in support of the judgment below were disregarded or reversed.

Art. 2465, Rev. Civ. Stats.; Baldwin v. Peet, 22 Texas, 710, 713, 715-6; 718, 721-2.

Brown v. Texas Cactus Hedge Co., 64 Texas, 396; cited in 8 Am. and Eng. Encyc. of Law, 756.

Simons v. Ash, 1 Texas Civ. App., 208-9, following Baldwin v. Peet, *supra*; Kendall Boot Co. v. Johnson, 24 S. W. Rep., 585, also following Baldwin case.

But as to admissibility of evidence and other questions involved here, the opinion is most instructive. It should be doubly so, since it proceeds from a court *in contact with the very case*—in substance—now before this court.

SECOND.

The contract created by "acceptance" is one of mutual obligation; and, to be effective against a stranger who disregards it, must have been entered into by the acceptor in good faith and without notice or means of notice of the fraudulent intent with which the instrument accepted was made, and be of such purpose, certainty and clearness that it binds the acceptor to rely upon the provisions made for him by the instrument, and to refrain from pursuit of other remedy against the maker thereof or his property, unless or until the provision fail.

If the evidence in this case tends to show a contract of acceptance by any beneficiary of the deeds of trust under which the plaintiff in error claims, it is not such contract as is defined, and the jury were warranted in finding adversely to him on that issue.

Whatever else he may have said, not a single person named in our adversary's brief as an acceptor of the trust deed testified that, in accepting, he relinquished, or intended to relinquish, for any time or in any degree, such remedy for the realization or security of the debt due him by Freiberg, Klein & Co., as might be available, independently of the provisions made for and the property subjected to such debt by the deed.

In interpreting the testimony on the issue of acceptance, a fact more important to be considered than any other is one that does not appear in the record at all, but, nevertheless, demands recognition, since it is matter of public history. It is, that at the time the Freiberg, Klein & Co. trust deeds were executed it was thought to be the law in Texas that when such a deed was made to and accepted by a trustee it operated to secure creditors named in it, though they had no knowledge of it when so given and accepted, nor when a creditor of the maker attached the property covered by it, and never themselves accepted it; and that nothing short of a renunciation of it by them would expose to such attachment the property so covered for their account. At that time it was generally—it may safely be said, universally—assumed that one was *presumed* to accept such an instrument when beneficial to him.

The authoritative judicial announcement that the law was otherwise—that acceptance was a contract, and like any other contract required to be of form and substance showing actual assent of the creditor upon consideration

moving to and binding him—was made by our Supreme Court, in *1894*, in the case of *Alliance Milling Co. v. Eaton, Guinan & Co.*, 86 Texas, 401.

Search for any indication in this record that any so-called accepting creditor supposed that such assent, on such consideration, was necessary to his protection, will prove vain. True, there are not wanting *indicia* of the presence of the self-protecting and conservative *afterthought;* but, notwithstanding, the statement will be found true.

There is not a shred of *writing* anywhere to say that any one accepted; not that writing was *necessary* to effect acceptance, but it is strange that no one used that certain and enduring medium of expression on occasion so strongly suggestive of the prudence of doing so—*if* he knew that his rights depended on his own, and not the trustee's, assent.

Take Lasker. He purported to "represent" three banks. Not one of these was shown to have adopted a resolution or other act with respect to the trust deed; nor does it appear that the subject was ever officially considered in any way by any one of them as a corporation. Lasker said:

> The First National Bank accepted the security provided for in the deed of trust. * * * After I saw mention of it in the paper, the next information I had was from Mr. Sonnentheil, who came to me and told me of it. I did not accept in terms; did not say the words, "I accept." *I did not see any occasion for that. I treated it as a benefit that was extended to me, and it was my province then to deal with it.* When I say me, I mean the First National Bank. (R., 146.)

Certainly he did not say, "I accept." Why should he, when he saw no occasion for it—that is, deemed it wholly unnecessary—treating the deed as a *benefit extended to him* and to be *appropriated by him*, without assumption of any corresponding obligation on his part?

The quoted and italicized lines perfectly reveal his conception of the transaction, and recall the preceding positive statement that the bank accepted the security. After adding that he represented, also, the Citizens' Loan Company and the Island City Savings Bank, he recites that Sonnentheil came to him, and, assuring him of his great confidence in his experience, consulted with him—not about accepting the deed, but—as to the retention in his service of the grantors and others. He spoke to him, however, as the "representative" of the three banks. Lasker advised a meeting of the different parties in interest, and such a meeting was held. There the main question discussed was, *whether Sonnentheil should sell goods otherwise than for cash, and it was unanimously determined in the affirmative.* The witness, reciting the facts of his participation in the proceedings of this meeting, said:

> I carried on the conversation in such a manner that Sonnentheil must have been *justified in believing* that I was there representing these institutions as an accepting creditor under this deed of trust. (R., 147.)

Later:

> The only member of the firm of Freiberg, Klein & Co., that I ever spoke about this matter with was Freiberg. It was the same day I first learned of the deed of trust. He came to show

me that he had dealt in good faith with these three institutions which I represented, and done the best he could to protect them. *I did not understand that it was a formal question as to whether I should accept or not*, but from the conversation which occurred between us *he had every reason to believe* I had accepted, and I had *nothing else in my mind* but that. That was the meaning I *intended* to convey. (R., 148.)

* * * * * * *

None of these institutions that I know of *repudiated or rejected* the securities provided in that deed of trust to Sonnentheil. (R., 149.)

It seems to me clear that the only natural and obvious inference that the language of the witness warrants is, that the deed, made to and accepted by the trustee, *of its own force and without assent of the beneficiaries or the assumption of any obligation by them in consideration thereof*, "extended" to them a "benefit" which they could avail of or decline, at their option; and that their rights were secure so long as they did not *repudiate* or *reject* the deed.

It is, upon any other hypothesis, inconceivable that a man of his intelligence and business equipment should have left so important a fact as his acceptance of the deed to be *conjectured* by both the trustee and the maker with whom he had held converse about it, when it needed only a single written line or a single spoken sentence to *assure* it.

And not more to the witness than to the trustee and the maker does this reflection apply, since it was the duty of one and the interest of both to have of the wit-

ness an unequivocal declaration that he accepted the deed and abided the obligations arising from that act.

It becomes important to refer to Mr. Lasker's testimony in a somewhat different, though scarcely less important, connection.

While speaking of himself, generally, as representing the three banks named, he admits that Kempner, the president of the Island City Savings Bank, had "first accepted" for *that* bank. (R., 148.) And, in referring to the meeting that considered and decided whether the trustee should sell on other than cash terms, he says:

> Kempner asked me to speak for the Island City Savings Bank, and it was the understood agreement of both of the other institutions that I represented them. * * * Kempner was not present. He was president of the Island City Savings Bank, and *first told me about the arrangement. He seemed to have known of the arrangement before I did; that is, the deed of trust and that meeting which he called me to attend for the Island City.* He himself was busy. *He seemed to understand the situation when I first heard of it, and I took it from what he told me.* (R., 147.)

Kempner did certainly "understand the situation" quite early enough. He assisted to organize and maintain the conspiracy of which "the situation" was the result, and it is upon the fact that *he* "first accepted" the trust deed that the right of the plaintiff, as trustee of the Island City Savings Bank, must rest. (R., 189-92, 147-8.)

Dr. Fly said:

> The evening the deed of trust was made I heard some little rumor that the failure was contemplated. Some one mentioned it on the street. I do not remember. That night at 10 o'clock Seinsheimer telephoned me himself; said they had failed. They

had put me on the list of preferred creditors and *headed the list with me*, and I told him I knew it would be all right. *I never gave it a moment's thought*; I told him that it was all right; *I had not concerned myself about it. I was practicing medicine.* I saw Seinsheimer next day. He mentioned the fact again, as he had telephoned me. I said it was all right. I was paid by Sonnentheil the full amount of the claim. *I never repudiated the deed of trust* nor the money which Sonnentheil offered me. (R., 151.)

Dr. Fly seems to have entertained the same view as that of Mr. Lasker as to the operativeness in favor of creditors of a deed to a trustee. He was a busy, professional man—was at the head of the list, and evidently felt secure; had no concern; gave the matter no thought; didn't even remember the "some one" who spoke of the failure on the street; never *repudiated* the trust deed.

It may be added, that the requirements of the profession which engaged this gentlemen would necessarily lead to associations so extended that they could scarcely fail to embrace that circle of bankers, brokers and business men to whom the situation of Freiberg, Klein & Co. had long before been the theme of discussion; and it is noticeable that he does not disclaim information likely to be acquired from such associations.

B. Adoue was a member of the firm of Adoue & Lobit, bankers, creditors of Freiberg, Klein & Co. at the time of their failure, by their unsecured note for $5000, and their notes for $10,000 secured by Fellman & Grumbach's indorsement. Sonnentheil told him on the morning following the failure that the firm was secured by the trust deed, and his assistance would be expected in the management of the business. This was promised. He could not re-

member the words with which he answered Sonnentheil's notice of the failure; "said it was all right, very glad he was assignee; hoped we would get our money back." He attended two or three meetings—one, he thought, on the day following the failure, at which was "discussed the policy which would be best for disposing of the business and getting our money out of it." This was at the office of Scott, Levi & Smith. Sonnentheil, Lasker, Levi, *Fellman* and *Grumbach* were present.

Sonnentheil finally asked the question if it was best to *sell the goods on credit or to sell them for cash, as a whole.* *We* settled that point in favor of *continuing the business as it was,* as we considered that character of business, a good deal in barrooms, there would be a great loss *unless the business was kept going, and we thought it best to keep the business going on as it was.* * * * I did more than indicate my acceptance of the security that was *given* me by the deed of trust. *We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it; that was my idea.* (R., 152.)

There is not the least indication here that Adoue understood that the facts related had any further consequence than the provision for his firm, and others, of means through which the duties imposed on the trustee by the deed could be made impossible of execution, and such of the creditors as attended the meeting could arbitrarily usurp control and disposition of the property and "keep the business going on as it was," for their own account. Even *Fellman's* co-operation was availed of to promote the enterprise.

One of our criticisms, applicable alike to both deeds, was and is, that the trustee is thereby vested with power

to sell on credit and indefinitely prolong the period of disposition. This was, and is, denied by our adversaries; and Mr. Levi testified that, when consulted by Sonnentheil on that point, his firm advised that the deed did *not* authorize sales on credit. He added, however, that when Sonnentheil explained that the assets held by him consisted largely of barroom accounts, which would in great part become worthless if supplies to barroom patrons were suddenly cut off, and that, besides, these patrons would have to suspend business, he directed him to consult the parties interested, and thereupon the meeting, to which Adoue and other witnesses refer, was convened and the question discussed. (R., 224.) We have seen how it was decided.

Mr. Levi further remarked, that at the time he directed Sonnentheil to proceed in the manner indicated, no hostile process had challenged his title as trustee. (R., 224)

It would seem to have been Mr. Levi's view that notwithstanding a *deed* to a trustee does not empower *him* to sell on credit, yet, when no stranger has assailed his title, he may lawfully submit *to the creditors preferred in the deed* the question whether or not he shall so sell, and abide their decision.

It is somewhat difficult to apprehend how the persons for whose benefit other persons have, by a deed, confided in a trustee certain powers, not including the power to sell on credit can, by virtue of the failure of strangers to

challenge the deed, acquire and exercise the omitted power.

For the rest, Mr. Adoue, from the nature of his business and the place of his residence, should have known, if he did not, all that others knew of the situation and proceedings of Freiberg, Klein & Co.

No part of Adoue & Lobit's debt was paid. (R., 152.)

Mr. Marx had lived *for many years* in Galveston; a *member of the firm of Marx & Blum*; made the transaction by which S. A. Walker became a creditor of Freiberg, Klein & Co., out of which resulted the debt, $15,000, of that firm to Walker at the date of their failure; learned of the failure the morning following its occurrence; did not know of it before; talked to Fellman about the trust deed; he was indorser of Walker's paper; accepted under deed probably next day, to Seinsheimer, he thought, was authorized to do so for Walker; Walker was then in Missouri; had *telegraphic* authority from him; *may not be able to find it now;* telegraphed the fact of the failure to Walker, and he replied by telegram that he *looked to him* to *protect* his claim; did not release Fellman or Grumbach; did look to them as a last resort; got the money; somebody paid it—the receiver he thought; *was out for money and did not care through what medium it came to him.* (R., 155–6.)

According to the "receiver," Mr. Marx was in error as to the source from which the money was derived. Mr. Sonnentheil, whom we presume was meant by that designation, testified that he paid nothing on the claims

of either American National Bank, Adoue & Lobit, Citizens' Loan Co., George Ketch, Mrs. A. Lowenstein, Irving National Bank of New York, or *S. A. Walker*.

The payments made by him aggregated $48,206.73—to Island City Savings Bank, $29,256.16; to First National Bank, $13,391.19; to A. W. Fly, $3913.91; to B. Kahn, $1645.47. (R., 117.)

Mr. Marx was probably mistaken, too, in stating that he looked to Walker's indorsers "as the *last* resort;" for it was an admitted fact that those indorsers paid the debt due Walker.

Indeed, the payments made by Fellman & Grumbach and those made by Sonnentheil discharged every debt due the beneficiaries of the deed, save only that of $15,000 due Adoue & Lobit.

Without denying the facts which involve Freiberg, Klein & Co. in a long course of fraudulent deception of the Brewing Company and the public, whereby credit and goods were obtained under pretenses known to be false, and with the proven purpose of self-aggrandizement at the expense of their creditors, the plaintiff would have it that evidence of this flagitious conduct was impotent in *his* suit against their intended victims. This is pressed, for the most part, on the assumption that nothing occurring before or after the trust deed could affect the plaintiff or the accepting creditors, in the absence of proof of their privity in fact with such occurrence. Authorities already cited to the competency of evidence of all facts preceding, attending or following the alleged

fraudulent act, overthrow this assumption, and it is passed without further remark; but we would consider the further contention, presented with the foregoing in some of the assignments, that the judgment should be reversed because of the admission, in connection with the testimony of the witnesses Gorse and Grelling, of copies of documents not shown to be lost or inaccessible.

The eleventh assignment (R., 243-4) admits, at its close, that the *original* report of *September 29, 1892*, made by Freiberg, Klein & Co. to the commercial agency, "showing net worth of $208,623.36," was put in evidence by the defendants; but objects to the testimony of the witness Gorse, because it "related to and embraced copies of original documents not shown to have been lost and not produced or otherwise accounted for, and which were better evidence than the copies." It will appear from Gorse's testimony that he states, *as an independent, affirmative fact*, that Freiberg, Klein & Co., made reports to the commercial agency, not only on September 29, 1892, but also on February 13, 1892, and February 1, 1891, grossly exaggerating their capital. True, he has before him, attached to the interrogatories, sheets purporting to contain copies of such reports and is asked whether these are substantial copies, and he says they are; but he says, also, that they did make the original reports, and mentions the details of their delivery to him by Grelling, in whose handwriting they were, for and at the instance of Seinsheimer, a member of the firm of Freiberg, Klein & Co. (R., 206-8.)

The sixth, seventh and eighth assignments complain in like manner of Grelling's testimony in connection with copies of the reports to the commercial agency of March 14 (February 1), 1891, and of February 13, 1892. (R., 241.)

Grelling identifies the original report of September 29, 1892, saying that "we," that is, Freiberg, Klein & Co., made regular reports to the commercial agency annually, in February; that *this* was a special or call report, and was false, and that the firm could not have continued business had a true report been made. (R., 199.) The plaintiff drew from the witness, on cross examination, a statement showing the same "net worth" as that of September 29, 1892, of which the words were in Seinsheimer's, and the figures in Freiberg's handwriting. (R., 203.) The witness was shown copies of the reports of February 13, 1892, and February 1 (dated March 14), 1891, and said they were copies from the agency's boards, or files. His evidence went no further as to the report of February 1, 1891. (R., 201.) As to the report of February 13, 1892, he declared that the surplus, or "net worth," shown by it—$200,987.42—was false; that he considered the firm insolvent then. (R., 200.)

If on the record thus presented it can be said that there was error, it must be seen that it was merely technical and harmless, and could not have prejudiced the plaintiff's case. Aside from the fact that Gorse testified directly and independently that false reports were made

in February, 1891 and 1892, the known fact and falsity of the latter and far more significant special report of September 29, 1892, was established without contradiction—was, indeed, put in evidence by the plaintiff in error himself. (R., 203.) And, in addition to this, Werner obtained of the agencies independent reports of like character, in the fall of 1892 (R., 210); and that reports purporting to show their financial condition were made annually, in February, by Freiberg, Klein & Co. to the commercial agencies, and that they knew themselves to be insolvent from about February 1, 1891, if not earlier, is indisputably shown by Freiberg. (R., 187-191.)

But these contentions, although reflected by assignments of error repeated here, do not, perhaps justify notice by us in this court. They are pretermitted by the petition of the plaintiff in error to the Circuit Court of Appeals for a rehearing (R. 260-2); and the eighth question, stated on page 36 of this present brief and argued on pages 76-7, is restricted to another and different contention.

The Circuit Court of Appeals, upon repetition before it of the identical claims for relief which had been denied to the plaintiff below by the verdict, judgment and refusal of new trial, affirmed the judgment assailed, and, afterwards refused to rehear the case. Its opinion is a luminous reduction of the case of the plaintiff in error to the contention that the judgment of the trial court should be reversed because that court refused to instruct the jury, peremptorily, to find for the plaintiff:—

Before Pardee and McCormick, Circuit Judges, and Speer, District Judge.

McCormick, Circuit Judge, delivered the opinion of the Court:

This case is brought to us on writ of error to the Circuit Court for the Eastern District of Texas. The statement of the evidence embraced in the bill of exceptions covers 169 full octavo pages of the printed record. The general charge of the court covers 9 pages of the same printed record, and the assignment of errors covers more than 20 pages. The distinguished gentlemen who appear as counsel for the parties have filed printed briefs of their respective propositions, authorities, statement of the evidence and argument thereon, admirably condensed and able, covering the one 54 pages and the other 55 pages. The respective counsel have also been fully heard in oral argument. From all of which it clearly appears that the only alleged error in the trial in the Circuit Court of which the plaintiff now complains is the failure of the trial judge to direct the jury to find for the plaintiff and leave to the jury only the matter of assessing the damages. On this point the plaintiff requested the court to charge as follows: "The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been at the time of its execution the bona fide debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by The Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed, and converted them to the use of said brewing company. You are therefore instructed to

find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon, at the rate of six per cent per annum, from the date of such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized; neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

There was no error in refusing this request. It asks much more than the giving of the general charge. We have had occasion in several cases to notice and disapprove the practice of attempting by a request for the general charge to practically convert severely contested actions at law into suits in equity, and thus force on the judge of the Circuit Court the work of trying complicated issues of fact without the aid of a master or that opportunity for time to consider which a hearing in equity affords, resulting, when judgment goes against them, in their bringing up all the evidence in its amplest detail to this court as if the case was here on appeal. If by stipulation a jury had been waived and the trial had proceeded before the judge alone, neither party could have demanded or rightly asked the judge to make special findings of fact. Baer v. Key West, Fed. Rep. This request not only asks the court to make at least five special findings of fact, but that the findings shall be in favor of the plaintiff. It may have been the duty of the court to instruct the jury as to the legal effect of the written instrument relied on in this case as a deed of trust if the court had not already instructed the jury on that subject as follows: "I have inspected this deed of trust and my opinion is that upon its face it is a legal instrument; that upon the execution and delivery of that instrument to Mr. Sonnentheil that it vested the title in Mr. Sonnentheil—the title therein named—for the purpose therein named." As a request for a charge as to the measure of damages it was rightly refused because it was fully embraced in the general charge in terms of which the plaintiff could not and does not complain; to illustrate which we quote from the general charge as follows: "Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before

the attachment is levied, the trustee can not recover, but if any creditor has accepted the terms of that instrument before the attachment has been levied the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you and ably, upon both sides; well presented by the attorneys for the parties on both sides. The contention has been that even if some one creditor did accept that the trustee could recover only to the extent of the debt thus accepted. The other party has contended that that was not the law; we being in a court of law, that you could not marshal assets and have an adjustment of the equities; that consequently it was legal or illegal. I agree with the latter contention. I hold as a matter of law that if you find as matter of fact that if any creditor accepted the terms of this instrument before the levy of the attachment and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed the entire property named in this deed passed to the trustee, and for this action he may recover for whatever it may be shown the property was worth at the time and place it was taken. I mean if you believe from the evidence that there is a single excepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of six per cent per annum from that date until now." We express no opinion as to the instructions just quoted further than to say, as we have above said, that the plaintiff does not and can not complain of them. Our conclusion on the case is that the plaintiff does not suggest and now urge any error in the rulings of the Circuit Court for which its judgment should be reversed, and it is therefore affirmed. (R. 283-5.)

We assume that since the present writ is brought to reverse the judgment of the Circuit Court of Appeals, no claims will, or can be properly, urged here, save such as were presented by the petition to that court for a rehearing.

These were, in substance:

1. Refusal to maintain the thirteenth assignment, viz. That the trial court declined to charge, that mere knowledge of the debtors' insolvency was not sufficient to put the beneficiaries of the trust deed upon inquiry as to the debtors' alleged fraudulent intent.

2. Refusal to maintain the eleventh assignment, viz: That the trial court admitted the testimony of Gorse of rumors prevalent in Galveston as to the threatened insolvency of the debtors—the witness declining on cross-examination to give the source or particulars of the rumors.

3. Refusal to consider the fourteenth assignment, viz: That the trial court erred in its charge as to what constituted "acceptance" by a corporation, and in refusing a special instruction offered to correct any misapprehension on that subject.

4. Failure to determine a point involved in the first, second, third and fourth assignments, viz: That the trial court improperly admitted evidence of misconduct of the debtors after the trust deed was executed and the trustee was in possession; because the beneficiaries' rights were not affected by it—since they could not have known at the time of their acceptance facts that had not then transpired.

5. Holding that the trial court rightfully refused to give the general charge requested by the plaintiff, taking from the jury the right to determine the acceptance *vel non* of the trust deed by any of the beneficiaries prior to

the day of attachment; and whether, if accepted, it was accepted without notice of the fraud in the deed—"there being no conflict of evidence on these questions, but the undisputed testimony showing such acceptance and want of any such notice."

6. Failure to determine the validity of exceptions to the general charge in so far as it left to the jury to determine said questions—the plaintiff in error claiming that the points were made by the eighteenth and nineteenth assignments.

7. Failure to consider the twentieth assignment, viz: That the evidence was insufficient to support the verdict. (R., 260-2.)

The three assignments added in this court—twenty-first, twenty-second, twenty-third—and directed against the Circuit Court of Appeals only, are, in substance: That it erred in holding that the only question submitted for its decision was the refusal of the trial court to give the peremptory charge, recited in the twelfth assignment, and in holding that said charge asked the court to make several special findings; and in refusing to reverse the judgment. (R., 280-1.)

It is believed that the unsoundness of the various propositions relied on by the plaintiff in error, as applied to the case at bar and affected by the plaintiff's acts of commission and omission in the course of the trial, is disclosed by the record itself, and we are disinclined to indulge further argument.

Surely enough has been shown to secure against reversal the judgment rendered by the trial court on the verdict of the jury on issues of fact, and maintained by that court against motion for new trial; and, again, maintained by the Circuit Court of Appeals, both on original submission and petition for rehearing.

In Texas, the trustee in a trust deed acquires no *title* of any kind in the property subjected by the deed to the claims of creditors of the maker. Whatever seeming title he may acquire is derived, not from the instrument executed to him by the maker, but, from the act of the creditor accepting it. If the debt of such accepting creditor be discharged after the deed is executed—or if there be more than one such creditor, then to the extent that the debts are discharged—the deed, being a mere security, is itself satisfied, and the whole basis of the trustee's "title" disappears. Yet, the plaintiff in error, confessedly owing such right as he may have to his trusteeship, seeks to recover the total value of property attached by honest creditors and judicially appropriated to the satisfaction of their debts, although it is admitted that all the creditors in whose behalf he was constituted trustee, and to the existence of whose debts he owes such rights as he may possess, have been paid in full—save only one firm, claiming but denied to be accepting creditors in the sense of the law, asserting a still subsisting indebtedness, in an amount which is relatively insignificant.

And, besides, such remedy is pursued in the face of the clearly established fact that sums, largely exceeding the claim of the unpaid firm, have been collected by the plaintiff in error as "trustee" and paid to one or more parties, named in the deed, of whom neither want of knowledge of the fraud assailed, nor "acceptance" according to the requirements of law and in good faith can be fairly affirmed on the evidence.

Counsel for Defendants in Error.